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Supreme Court of the United States

October Term, 1955

No. 314

SARA BILLINGS BOARDMAN SMITH, Executrix of the last Will and Testament of HARVEY A. SMITH, Deceased,
Appellant

vs.

JOSEPH B. WISSLER, President Judge, and H. CLAY BURKHOLDER, Additional Law Judge, of the COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA,
Appellees

JURISDICTIONAL STATEMENT ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA

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October Term, 1955

No.

Sara Billings Boardman Smith, Executrix of the last Will and Testament of Harvey A. Smith, Deceased,

Appellant

vs.

Joseph B. Wissler, President Judge, and H. Clay Burkholder, Additional Law Judge, of the Court of Common Pleas of Lancaster County, Pennsylvania,

Appellees

JURISDICTIONAL STATEMENT ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA

(a) OPINIONS IN THE COURT BELOW

The opinion of the Court below and the "concurring in part and dissenting in part" opinions of Bell and Musmanno, Justices, are officially reported in 381 Pa. 223, and unofficially reported in 112 A. 2d 625. The opinions are appended as Appendix A and Appendix B, respectively.

(b) STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION IS INVOKED

(i) This was a common law proceeding in which the original jurisdiction of the Supreme Court of Pennsylvania was invoked by a petition for a writ of Prohibition to the Judges of the Court of Common Pleas of Lancaster County to prohibit enforcement against appellant of a Rule of Court adopted by the latter Court, under the authority of a Statute of Pennsylvania adopted January 14, 1952 (Act No. 590; Pamphlet Laws of 1951-1952, 2087; 5 P.S. Sec. 30, et seq.), which authorized the Courts of Common Pleas by general rule to impose compulsory arbitration in civil cases involving One Thousand Dollars or less. The Supreme Court of Pennsylvania refused a writ of Prohibition, but substituted for it a rule on the Judges of the Common Pleas to show cause why a writ of mandamus should not issue directing them to place appellant's case on the list for jury trial. After answer filed and argument on the merits, the Supreme Court discharged the rule and imposed the costs on the petitioner (appellant). This appeal is from the judgment discharging the rule.

(ii) The judgment sought to be reviewed was dated March 23, 1955 and it was entered March 23, 1955. The notice of appeal was filed June 17, 1955, in the Supreme Court of Pennsylvania.

(iii) The statutory provision believed to confer on this Court jurisdiction of the appeal is the Act of Con-

gress of June 25, 1948, c. 646; 62 Stat. 929; 28 United States Code, Sec. 1257 (2).

(iv) The following cases are believed to sustain the jurisdiction:

1. An appeal lies from a judgment of the highest court of a state entered in proceedings under its original jurisdiction.

Chas. Wolff Packing Co. v. Court of Industrial Relations of Kansas, 262 U. S. 522; 43 S. Ct. 630 (1923)—mandamus in Supreme Court;

Consolidated Textile Corp. v. Gregory, Judge, 289 U. S. 85; 53 S. Ct. 529 (1933)—prohibition in Supreme Court.

Broad River Power Co. v. State of South Carolina, 281 U. S. 537; 50 S. Ct. 401 (1930)—mandamus in Supreme Court.

2. The constitutionality of the Pennsylvania Statute was challenged in the original petition to the Supreme Court of Pennsylvania under the Due Process and Equal Protection clauses of the Fourteenth Amendment. The contentions were pressed in the brief and oral argument for the petitioner in that Court. The case is therefore properly in this Court on appeal.

Miller v. Schoene, 276 U. S. 272; 48 S. Ct. 246 (1928);

The Railroad Company v. Maryland, 87 U. S. (20 Wallace) 643 (1874).

3. The validity of the Rule of the Court of Common Pleas was also challenged in the petition under the Due

Process and Equal Protection clauses. The Rule of Court is a Statute of the State within the meaning of the Act conferring jurisdiction on this Court on appeal.

A rule of court adopted under authority of a Statute has the force of a Statute. *Weil v. Neary,* 278 U. S. 160, at pp. 169, 170; 49 S. Ct. 144 (1928).

> "Any enactment, from whatever source originating, to which a State gives the force of law is a Statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court".
>
> *Williams v. Bruffy,* 96 U. S. 176, at p. 183 (1877).

The Supreme Court of Pennsylvania has many times decided that rules of court adopted pursuant to Statute have the force of Statutes.

Schofield Discipline Case, 362 Pa. 201; 66 A. 2d 675 (1949);

Colflesh v. Provident Trust Co., 317 Pa. 46; 176 A. 433 (1935);

Wanamaker v. Wanamaker, 315 Pa. 229; 172 A. 846 (1934).

Also cited are:

Zucht v. King, 260 U. S. 174; 43 S. Ct. 24 (1922), —City Ordinance.

Corn Products Refining Co. v. Eddy, 249 U. S. 427; 39 S. Ct. 325 (1919)—regulation of State Board of Health adopted under statute (p. 437);

Sultan Railway & Timber Co. v. Department of Labor & Industries of the State of Washington,

277 U. S. 135; 48 S. Ct. 505 (1928)—order of State Board requiring report of number of employees, wages paid, etc.

Lake Erie & Western Railroad Co. v. State Public Utilities Commission of Illinois, 249 U. S. 422; 39 S. Ct. 345 (1919)—order of State Commission, under legislative authority, to restore a siding;

Live Oak Water Users Assn. v. Railroad Commission of State of California, 269 U. S. 354; 46 S. Ct. 149 (1926)—order of State Commission fixing water rates.

Whether or not the rule of court be a State Statute within the meaning of the Act of Congress, its validity is properly reviewable by this Court, if the case is properly here on other grounds, i.e. on the question of the validity of the Act of the Legislature itself.

Zucht v. King, supra.

4. Although the Federal questions were not discussed by the Supreme Court of Pennsylvania in its opinion, they were necessarily decided. The Statute and Rule were upheld against specific contentions that they violated the Due Process and Equal Protection clauses. As a matter of fact, the Supreme Court of Pennsylvania seems actually to have found that the rule deprived appellant of due process, but by some incomprehensible reasoning arrived at the conclusion that she must submit to it.

No alternative non-federal ground was asserted by the court as the basis for its decision. It merely held that the act and rule did not violate the State constitution.

Failure to discuss the Federal question plainly implied that the Court rejected the claims of violation of the Due Process and Equal Protection clauses.

Norris v. State of Alabama, 294 U. S. 587; 55 S. Ct. 579 (1934), where it was said (at p. 590), "When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms, but also whether it was denied in substance and effect".

Even had the case been decided on a non-federal ground, this Court may inquire whether the grounds were substantial.

Broad River Power Co. v. State of South Carolina, 281 U. S. 537; 50 S. Ct. 401 (1930);

Lawrence v. State Tax Commission of Mississippi, 286 U. S. 276; 52 S. Ct. 556 (1932);

DeMorest v. City Bank Farmers Trust Co., 321 U. S. 36; 64 S. Ct. 384 (1944).

(v) There is involved the validity of the Statute of Pennsylvania approved January 14, 1952, which may be found in the official edition of the Laws of 1951-1952 at page 2087. Its text is set out verbatim in Appendix C.

There is also involved the validity of Rule No. 43 of the Court of Common Pleas of Lancaster County, Pennsylvania, adopted under the authority of the above Statute. The text of the Rule is set out verbatim in Appendix D.

(c) THE QUESTIONS PRESENTED BY THE APPEAL

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1. Does the Statute of Pennsylvania of January 14, 1952 (Pamphlet Laws of 1951-1952, 2087; 5 P.S. Sec. 30, et seq.) imposing compulsory arbitration in certain civil cases deprive appellant of due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States?

2. Does the Statute of Pennsylvania of January 14, 1952 (Pamphlet Laws of 1951-1952, 2087; 5 P.S. Sec. 30, et seq.) imposing compulsory arbitration in certain civil cases deprive appellant of the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States?

3. Does Rule 43 of the Court of Common Pleas of Lancaster County, Pennsylvania, adopted under the above Statute, deprive appellant of due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States?

4. Does Rule 43 of the Court of Common Pleas of Lancaster County, Pennsylvania, adopted under the above Statute, deprive appellant of the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States?

(d) STATEMENT OF THE CASE

On March 29, 1954, appellant's testator began an action of trespass in the Court of Common Pleas of Lancaster County, Pennsylvania, by filing a complaint against one Myrtle E. Neff to recover damages arising out of an automobile collision. The amount claimed was $249.19. No answer was filed within the required time, and under the Pennsylvania law the case was at issue. It was placed by the plaintiff on the list of the Court of Common Pleas for jury trials before July 1, 1954, the effective date of the Rule of Court involved here, and before the closing date of the trial list.

On June 18, 1954, the Court of Common Pleas had adopted a Rule of Court entitled "Rule 43. Compulsory Arbitration". The Rule was adopted under the authority of the Statute of Pennsylvania of January 14, 1952 (Act No. 590, P.L. 2087; 5 P.S. Sec. 30, et seq.) It provided that civil cases in which the amount in controversy was $500 or less should be submitted to a board of arbitration composed of three members of the Bar of the County, *appointed by the Prothonotary alphabetically from the list of attorneys qualified to act.* Attorneys "qualified to act" were those who filed with the Prothonotary their consents to act and who were not disqualified by relationship or interest.

The arbitrators were not required to make a record of the proceedings. A party could require a record to be made

at his own cost. The arbitrators were required to file a report with the Prothonotary within twenty days after the hearings, signed by all or a majority of the board. The report was not required to contain a recital of the facts or a statement of the board's reasons. The report and award, if any, unless appealed from, were to have the effect of a verdict, and judgment might be entered on the award on praecipe and execution might issue thereon. The compensation of the arbitrators was fixed at $25 for each arbitrator per case, with a provision that the court might allow additional compensation in cases of unusual duration or complexity. The arbitrators' fees were to be paid *out of County funds* immediately on filing their report.

An appeal was provided to the Court of Common Pleas, subject to a number of conditions. The one complained of is that an appellant was first required to *repay to the County* the fees received by the arbitrators—which under the Rule could not be less than $75, and might be more. *These fees were not recoverable by the appellant, even though his appeal was successful. They were not to be taxed as costs and not to be recoverable by the appellant in any proceeding.*

Cases listed for trial before the effective date of the Rule were to be stricken from the trial list and referred to arbitration. Appellant's case *was* stricken from the trial list after the petition for a writ of Prohibition was filed in the Supreme Court of Pennsylvania, but before the case was argued,—a fact called to the latter Court's attention in the petitioner's Brief.

The Rule of Court was adopted pursuant to authority granted by the statute of Pennsylvania referred to, which

authorized the Courts of Common Pleas to provide by rule for arbitration by three members of the Bar of the county of civil cases in which the amount in controversy was $1,000 or less. The Statute provided that the arbitrators should be *appointed by the prothonotary alphabetically from the list of qualified attorneys.* The compensation of the arbitrators was to be *fixed by the Court* and *paid by the County,* and *the Statute placed no limit on the amount which the court could fix.* The arbitrators' compensation was *not to be taxed as costs or to follow the award.* An appeal was allowed, but the appellant, among other conditions, was required *to repay to the County the arbitrators' compensation,* which he *could not recover as costs or otherwise in any proceeding, even though successful.* The arbitrators *were not required to make a record of the proceedings* and a party desiring a record to be made had to pay the cost of making it.

Appellant's testator filed the Petition in the Supreme Court of Pennsylvania, invoking its original jurisdiction under well established practice, for a writ of Prohibition to prohibit the enforcement of the Rule against him. See *First Congressional District Election,* 295 Pa. 1; 144 A. 735 (1928), and *McNair's Petition,* 324 Pa. 48, at 64; 187 A. 498 (1936). The petitioner specifically complained that both the Statute and the Rule violated the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court, without any statement of its reasons, denied the writ of Prohibition, but substituted for it a rule on the judges to show cause why a writ of Mandamus should not issue requiring them to list appellant's case for jury trial. The judges filed an answer setting up the authority of

the Statute as the basis for the Rule and their belief that neither Statute nor Rule violated any constitutional rights of the petitioner.

The Supreme Court listed the cause for argument and it was argued January 5, 1955. After argument and before the decision, the petitioner died and his executrix was substituted. One of the respondents also died and the newly appointed members of the Court were substituted.

The Supreme Court discharged the Rule and imposed the costs on the petitioner, two Justices dissenting in part. The Court held that the Statute "is constitutional and in all respects valid, but that Rule 43 of the Court of Common Pleas of Lancaster County should be amended in the two respects herein indicated". Those two respects were that the Act should follow the Statute in making all cases involving $1,000 or less, rather than $500, subject to compulsory arbitration, and that the Rule "should provide for a lower rate of compensation where only a comparatively small claim is involved". The opinion of the Supreme Court was advisory only, as stated in the dissenting opinion, but thereafter the Court of Common Pleas amended the Rule by making all cases involving $1,000 or less subject to it and fixing the arbitrators' compensation in cases involving $250 or less at $15 each (appellant's claim is for $249.19). The Supreme Court held that petitioner (appellant's testator) is "not presently affected by either of such directed amendments. His claim is subject to the arbitration provisions of the Act, and accordingly the rule to show cause why a writ of mandamus should not issue directing the court to place the case on the list for trial before a jury is discharged. Costs to be paid by petitioner".

(e) THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Not only are the federal questions substantial, but we believe few more important questions have ever come before the Court. This Pennsylvania Statute is the entering wedge for laws depriving all litigants of the right of trial of their causes before judicial bodies, according to the due forms of law. The question is not only, as the Court below seemed to assume, whether appellant has been deprived of a trial by a jury, but whether she has been deprived of a trial in "established judicial tribunals with all their safeguards". *Arthur Phillip Export Corp. v. Leathertone, Inc.*, 275 App. Div. 102; 87 N. Y. Supp. 2d 665 (1949).

If the states can take this right away in cases under $1,000, they can take it in cases over that amount. There is no magic in the figure $1,000. Neither, as we shall show, is there any valid reason for classification on such a basis.

It is conceded by everyone, that, as the law now stands, appellant is entitled to have her case tried by a jury, under the Constitution of Pennsylvania. But this Statute, we contend, not only deprives her of *that* right but of the right to trial before any legally established judicial tribunal. The questions therefore are whether either or both of those rights can be taken away from her by the State.

The Supreme Court of Pennsylvania concedes in its opinion that compulsory arbitration is a denial of due pro-

cess. This Court has so decided in *Chas. Wolff Packing Co. v. Court of Industrial Relations of Kansas,* 262 U. S. 522; 43 S. Ct. 630 (1923); *Dorchy v. Kansas,* 264 U. S. 286; 44 S. Ct. 323 (1924). The uniform current of decision is to the same effect. *Arthur Phillip Export Corp. v. Leathertone, Inc.,* supra; *People v. Haws,* 37 *Barbour* (N.Y.) 440 (1862); *Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co., Inc.,* 253 N. Y. 382; 389; 171 N.E. 579 (1930). *The Supreme Court of Pennsylvania* has previously so held. *Goldstein v. International Ladies' Garment Workers Union,* 328 Pa. 385; 196 A. 43 (1938); *Katakura & Co., Ltd. v. Vogue Silk Hosiery Co.,* 307 Pa. 544; 549; 161 A. 529 (1932). But the Court said that the right of appeal provided by the Statute and the Rule in this case preserve the element of due process that would otherwise be lacking. We shall examine this right of appeal presently. It is worthy of note that in the case at Bar the Court conceded that the Rule of Court "would seemingly operate as a strong deterrent, amounting practically to denial of that right".

Compulsory arbitration is a misnomer for the proceeding set up here. It is a contradiction in terms under any circumstances. Arbitration implies consent and from time immemorial has been a substitute for the compulsory processes of the law. What this Statute and Rule do is to set up an informal, irregular tribunal before which a litigant must try his cause—a tribunal bearing a sinister resemblance to the drumhead court-martial. The tribunal is selected alphabetically from members of the Bar willing to serve. It needs no imagination to foresee that this will resolve itself into the less busy, the less able lawyers. If the State can do this, it can direct that the arbitrators be selected from a list of engineers or school teachers or

chiropractors or at large, from a telephone directory. Being a lawyer gives no guarantee of judicial capacity. The judgment of two or three lawyers bears no comparison to the unanimous verdict of a jury or the decision of a judge. These arbitrators make no record, unless the party requesting it pays for it; they do not report the facts or give their reasons. It is a swift, unregulated procedure, wholly alien to the spirit of our laws and Constitution. A lawyer may be admitted to practice one day and the next or even the same day be named an arbitrator. In fact, all three arbitrators may be newly admitted lawyers without legal experience, without that common touch which distinguishes the jury, certainly without the judicial experience and authority of judges. This Statute is merely a way of saying "Here, this is a small claim. Get it decided and out of the way as quickly and cheaply as possible".

The provision for an appeal is a farce. Under the Rule—and the Rule in this respect is strictly within the Statute—appellant must forfeit at least $75 to take an appeal. Whether his appeal be justified or not, he cannot recover it. If his claim is $75 or less, is this right of appeal not illusory? Is it due process? The Court below itself conceded it was not. Under the Rule as enforced against the Appellant here, she would forfeit $75, or over 30% of her claim of $249.19, which is, we submit, unreasonable and confiscatory. How then can it be said that the Act and the Rule do not offend against the Due Process clause and that appellant has not been deprived of due process within the meaning of the Constitution?

Similarly, as to the Equal Protection clause. The Court below cites authorities to show that the State can provide different procedures, basing the differences on

the amount involved. No one disputes this. But taking away *the right to a judicial trial* except on confiscatory conditions has no reasonable relation to the amount involved. The money representing a claim is not the only factor entitled to consideration—a small claim may be as important to one litigant as a large claim to another. Credit, reputation, domestic happiness, safety, freedom from annoyance may be involved in cases in which the amount of the claim is but a symbol.

> "The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it if only a shilling be involved. . . The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis".
>
> *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150 (1897), at pp. 153-155.

(i) A copy of the judgment of the Supreme Court of Pennsylvania appealed from is appended as Appendix E.

Respectfully submitted,

ROBERT RUPPIN,

Counsel for the Appellant.

APPENDIX A

OPINION OF THE SUPREME COURT OF PENNSYLVANIA (MAJORITY OPINION)

OPINION BY MR. CHIEF JUSTICE HORACE STERN, March 23, 1955:

The question for determination is the constitutionality of the Act of January 14, 1952, P. L. 2087, amending the Act of June 16, 1836, P. L. 715, and the validity of the Rule of Court (Rule 43) adopted in pursuance of this legislation by the Court of Common Pleas of Lancaster County.

The Act of June 16, 1836, P. L. 715, provided for an elaborate system of Reference and Arbitration. We are concerned here, however, only with those sections of the Act, 8 to 38 inclusive, which provided for *compulsory* arbitration. By those provisions it was made lawful "for either party in any civil suit or action . . . to enter . . . a rule of reference, wherein he shall declare his determination to have arbitrators chosen . . . for the trial of all matters in variance in the suit between the parties." Arbitrators were thereupon to be selected in a manner prescribed by the Act, and it was then their duty to proceed to determine the matters in controversy and to make an award, which award, when entered in the office of the prothonotary, should have the effect of a judgment. Each of the parties was given the right to appeal from the award to the court in which

the cause was pending at the time the rule of reference was entered, but such appeal was subject to certain restrictions, one of which was that the party appealing should pay all the costs that had accrued in the action; there was a provision, however, that on presentation of an affidavit of poverty and consequent inability to pay the costs the party against whom the award was made, not being the party by whom the rule of reference was taken out, might be allowed to appeal without paying the costs. Another condition of the right of appeal was that the party appealing should enter into a recognizance the condition of which should be, if the plaintiff were the appellant, that if he did not recover a greater sum than the award of the arbitrators he would pay the costs that would accrue in consequence of the appeal and also one dollar for every day lost by the defendant in attending on the appeal; if the defendant were the appellant the condition of the recognizance was that, if the plaintiff obtained a judgment for a sum equal to or greater than the award of the arbitrators, he would pay the costs that would accrue in consequence of the appeal and also one dollar for every day lost by the plaintiff in attending on the appeal. The costs paid by either party could be recovered of the adverse party if, as the result of the suit, the appellant was entitled to recover costs under the provisions of the Act. The arbitrators were given the power to subpoena witnesses, books and documents, to issue attachments against witnesses neglecting or refusing to attend, to judge of the competency and credibility of witnesses and the propriety of admitting any written evidence that might be offered, to administer oaths or affirmations to witnesses, and to decide both the law and facts involved in the case. For their services the arbitrators were each to receive the sum of one dollar for every

day necessarily employed in the hearing, but only after they had made and filed their reports.[1]

The Act of January 14, 1952, P. L. 2087, amended this Act of 1836 by adding a new section which provides, inter alia, that "The several courts of common pleas may, by rules of court, provide that all cases which are at issue where the amount in controversy shall be one thousand dollars ($1000) or less, except those involving title to real estate, shall first be submitted to and heard by a board of three (3) members of the bar of the county for consideration and award." Instead of the method provided in the original Act for the selection of arbitrators it was now provided that the board should be appointed by the prothonotary from the list of attorneys qualified to act, the names of attorneys to be taken from the list in alphabetical order, the first member named to be chairman of the board. The board is to make its report and render its award within twenty (20) days after hearing. The compensation of the arbitrators is to be determined by the court and paid by the county upon the filing of their report and award. Any party appealing must first repay to the county the fees of the arbitrators thus paid by the county, but such fees are not to be taxed as costs or be recoverable from the adverse party in any proceeding; in other words, they are not to follow the award. All appeals are to be de novo. The arbitrators are not required to make a record of the proceedings before them, but if any party desires a record the arbitrators shall provide a reporter and cause a record to

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[1] By the Act of May 1, 1861, P. L. 521, this Act of June 16, 1836, was repealed so far as it related to compulsory arbitration in the city and county of Philadelphia.

be made and the party requesting the same shall pay the cost thereof.

In pursuance of the authority given by the Act the Court of Common Pleas of Lancaster County adopted a rule of court (Rule 43) providing, inter alia, that all cases at issue, where the amount in controversy is $500 or less, with the exception of certain actions which need not here be detailed, shall be submitted to, and be heard and, decided by, Boards of Arbitration each consisting of three attorneys, members of the bar of the county. Each arbitrator is to receive as compensation for his services in each case a fee of $25, but in cases requiring hearings of unusual duration or involving questions of unusual complexity the court may allow additional compensation.

Harvey A. Smith, a resident of Lancaster County, filed in this court a petition for a writ directed to the judges of the Court of Common Pleas of that county prohibiting them from putting this rule into effect on the ground that both it and the statute authorizing it are unconstitutional. He alleged that he had brought suit in trespass to recover damages arising out of an automobile collision; that the amount of damages sought to be recovered was $249.19; that the action was at issue and had been listed for jury trial before the rule of court went into effect; that he desired to have his action tried by a jury; and that under the provisions of the statute and the rule he will be deprived of a jury trial except under "burdensome, oppressive and unreasonable conditions." We denied the petition, but substituted for it a rule on the judges of the court below to show cause why a writ of mandamus should not issue directing them to place the case on the list for trial before a jury. The judges having filed an answer, the rule to show

cause is now before us for decision. The Cambria County Bar Association and J. Campbell Brandon, Esq., of Butler County, have filed briefs as amici curiae.

The Act of 1952, greatly enlarging, as it does, the scope of the Act of 1836, is of extreme importance in that it effects a decided innovation in procedure for the adjudication of the class of minor claims to which it relates. It has many obvious advantages. It is clearly designed to meet the situation which prevails in some communities of jury lists being clogged to a point where trials can be had only after long periods of delay,—a condition resulting largely from the modern influx of negligence cases arising from automobile accidents in a great number of which no serious personal injuries are involved. Removing the smaller claims from the lists not only paves the way for the speedier trial of actions involving larger amounts, but, what is of equal or perhaps even greater importance, makes it possible for the immediate disposition of the smaller claims themselves, thus satisfying the need for prompt relief in such cases. By the same token, and working to the same end, the use of the Act will free courts for the speedier performance of other judicial functions. Moreover, there will be a saving to claimants of both time and expense by reason of greater flexibilty in fixing the exact day and hour for hearings before the arbitrators as compared with the more cumbersome and less adaptable arrangements of court calendars. The operation of the Act has proved eminently successful in all respects, it appearing from statistics gathered in 19 of the 31 counties or more which have thus far put the statute into effect that there were 585 cases tried by arbitrators under its provisions in the period from July 1 to December 28, 1954,

in only 30 or 5% of which appeals were taken to the courts of common pleas. It would seem clear, therefore, that the system of arbitration set up by this statute offers encouraging prospects for the speedier administration of justice in the Commonwealth.

What, then, are the objections voiced against it on the alleged ground of unconstitutionality?

The main charge is that the Act violates Article I, section 6, of the Constitution that "Trial by jury shall be as heretofore, and the right thereof remain inviolate:" It is true, of course, that this provision of the Constitution would be violated by a statute the effect of which was to compel parties to submit to arbitration against their will or without their assent: *Cutler & Hinds v. Richley,* 151 Pa. 195, 25 A. 96. Indeed compulsory arbitration conflicts also with the 14th Amendment of the Federal Constitution in that it works a deprivation of property and liberty of contract without due process of law: *Chas. Wolff Packing Co. v. Court of Industrial Relations of the State of Kansas,* 262 U. S. 522; *Dorchy v. State of Kansas,* 264 U. S. 286. But this is so only where the statute closes the courts to litigants and makes the decision of the arbitrators the final determination of the rights of the parties; therefore there is no denial of the right of trial by jury if the statute preserves that right to each of the parties by the allowance of an appeal from the decision of the arbitrators or other tribunal; *Emerick v. Harris,* 1 Binney 416; *Capital Traction Co. v. Hof,* 174 U. S. 1; 50 C.J.S. 832, 833, §118. In the *Capital Traction Co.* case it was said (p. 23): "It [the Constitution] does not prescribe at what stage of an action a trial by jury must, if demanded, be had; or what condi-

tions may be imposed upon the demand of such a trial, consistently with preserving the right to it." The only purpose of the constitutional provision is to secure the right of trial by jury before rights of person or property are *finally* determined. All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable. As to what amounts to such a forbidden restriction it has been held that the constitutional provision is not violated by a requirement of the payment of costs before the entry of an appeal in order to obtain a jury trial: *McDonald v. Schell*, 6 S. & R. 239; nor by a requirement of giving bail for the payment of costs accrued and to accrue or for the performance of some other duty: *Haines v. Levin*, 51 Pa. 412; *Commonwealth, for use, v. McCann & Co.*, 174 Pa. 19, 34 A. 299; nor by a requirement of furnishing security for the prosecution of the appeal and satisfaction of the final judgment: *Capital Traction Co. v. Hof*, 174 U. S. 1, 23, 43-45;[2] nor by a requirement of the payment of a jury fee in advance of trial: *Gottschall v. Campbell*, 234 Pa. 347, 361, 83 A. 286, 291. There can be no valid objection, therefore, to the provisions of the Act of 1836, unchanged by the Act of 1952, regarding the payment of the accrued costs and the giving of a recognizance for the payment of the costs to accrue in the appellate proceedings as the condition for the allowance of an appeal from the award of the arbitrators.

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[2] Under the Act of June 24, 1885, P. L. 159, as amended by the Act of May 29, 1907, P. L. 306, it is made a condition of an appeal from an Alderman or Justice of the Peace that the appellant either pay the costs in the case, or give bail for the payment of debt, interest and costs accrued and to accrue, on affirmance of the judgment.

What the petitioner specifically complains of is the provision of the 1952 Act that the fees of the arbitrators, initially paid by the county, must be repaid to it by the party appealing and shall not be taxed as costs or be recoverable from the adverse party whether or not the appellant be ultimately successful in his appeal. As far as the prohibition of recovery of the fees from the adverse party is concerned, this involves no constitutional violation since the right to recover costs in litigation is purely statutory; it exists only to the extent authorized by legislative enactment (*Morganroth's Election Contest Case,* 346 Pa. 327, 328, 329, 29 A. 2d 502, 503; *Schultz v. Mountain Telephone Company,* 364 Pa. 266, 270, 72 A. 2d 287, 289), and if, therefore, the right to recover costs may be withheld by the legislature without infringing on the Constitution it would seem that the right to recover the compensation paid the arbitrators, which is an administrative expense, may similarly be withheld. But the real question is whether the required payment of such fees by the appellant amounts to such a substantial restriction upon the right to present his case to a jury as to constitute a violation of that constitutional right. As already pointed out, no such violation is involved in a requirement of the payment of a jury fee as a condition precedent to the right of such a trial. The problem, however, is one of degree rather than of kind. The rule adopted in Lancaster County which is here under consideration provides for compensation to the arbitrators in the sum of $25, each, or a total of $75., and the necessity of paying that amount as a condition for the right to appeal would seemingly operate as a strong deterrent, amounting practically to a denial of that right, if the case should involve only, as in the present instance, as little as $250. Therefore this rule, as well as the rules adopted or to be

adopted by the courts of common pleas of other counties, should take cognizance of this fact and should provide for a lower rate of compensation where only a comparatively small claim is involved. True, this might require an occasional sacrifice on the part of the members of the bar acting as arbitrators in such cases, but it is undoubtedly one that lawyers will cheerfully make in pursuance of those professional ideals which not infrequently lead them, under special circumstances and the observance of long established traditions, to render service to a client without any compensation at all.[3] The requirement that the appellant repay to the county the fees of the arbitrators is obviously designed to serve as a brake or deterrent on the taking of frivolous and wholly unjustified appeals; if there were not such a provision the defeated party would be likely to appeal in nearly all instances and the arbitration proceedings would tend to become a mere nullity and waste of time.

Objection is made by the petitioner to the limitation of the provisions of the Act to cases where the amount in controversy is $1,000 or less; it is claimed that this amounts to an improper classification in violation of Article III, section 7, of the Constitution forbiding the passage of special laws. It is, however, too well established to require extended discussion or citation of authorities that all that the Constitution demands is that the basis for classification be reasonable and founded upon a genuine and not merely artificial distinction, the test being, not wisdom, but good

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[3] Perhaps, as an alternative solution of the problem, the Legislature may see fit to amend the Act by providing that in the case of claims involving less than a certain amount the county should not require the appellant to repay the *entire* amount of the compensation paid to the arbitrators.

faith in the classification. Statutory distinctions based on the amount involved in the litigation have been regularly upheld. In *Mason-Heflin Coal Co. v. Currie,* 270 Pa. 221, 113 A. 202, the Sales Act of May 19, 1915, P. L. 543, was held constitutional in its provision that sale contracts involving a sum of not more than $500 need not be in writing whereas contracts involving a larger amount were enforceable only if evidenced by a memorandum in writing. The court there stated (pp. 225, 226, A. p. 204) that, once it be admitted that there was a valid reason for fixing a dividing line, the exact point at which it should be drawn was for the legislature and not for the courts. The Fiduciaries Act of 1949, P. L. 513, Section 202, the Incompetents' Estates Act of 1951, P. L. 612, Section 201, and the Uniform Commercial Code of 1953, P. L. 3, Section 2-201, all provide for differences in the procedure based upon the amounts involved in the proceedings. It is of interest in this connection to note that the Federal Constitution itself provides, in the 7th Amendment, for the preservation of the right of trial by jury only in suits where the value in controversy shall exceed $20. However, it must be pointed out that, since the Act of 1952 authorizes the courts to provide for compulsory arbitration in all cases where the amount in controversy shall be $1000 or less,—that is to say, *all* cases involving less than $1000—a court may not (as in the case of the Lancaster County rule) limit the submission to arbitration of cases involving less than *$500*; the system must either be adopted as an entirety and as prescribed by the Act or not at all. There can be no variances between the counties in that respect.

The fact that the counties may, in pursuance of the authority given by the Act, establish different rates of

compensation to the arbitrators is clearly not, as claimed by petitioner, a violation of Article V, section 6, of the Constitution providing for the uniform operation of laws relating to courts; there has never been, and need not be, uniform rates of compensation paid in the various courts to masters, referees, and other members of the bar rendering judicial or quasi-judicial service. And the further objection that the permission given to the courts to establish boards of arbitration represents an unconstitutional delegation of legislative power is obviously untenable, for it is the statute itself which provides for such boards, leaving to the courts only the right to make administrative regulations; all the powers to be exercised by the arbitrators are also granted to them, not by the courts, but by the statute, which powers, incidentally, do not differ from those commonly vested in many of the administrative bodies which are now such important tribunals in the administration of justice.

Our conclusion is that the Act of January 14, 1952, P. L. 2087, is constitutional and in all respects valid, but that Rule 43 of the Court of Common Pleas of Lancaster County should be amended in the two respects herein indicated. Petitioner, however, is not presently affected by either of such directed amendments. His claim is subject to the arbitration provisions of the Act, and accordingly the rule to show cause why a writ of mandamus should not issue directing the court to place the case on the list for trial before a jury, is discharged. Costs to be paid by petitioner.

APPENDIX B

OPINION BY MR. JUSTICE BELL CONCURRING IN PART AND DISSENTING IN PART, JOINED IN BY MR. JUSTICE MUSMANNO:

Smith filed in this court a Petition for a Writ of Prohibition prohibiting the Judges of the Court of Common Pleas of Lancaster County from putting into effect their Rule of Court No. 43, on the ground that both it and the Amendatory Act of January 14, 1952, which authorized it, are unconstitutional. Smith alleged that he had brought an action in trespass to recover damages arising out of an automobile collision; that his damages totalled $249.00; that his action "had been listed for jury trial before the Rule of Court [No. 43] went into effect"; that he desired to have his action tried by a jury; and that under the provisions of the Act of 1952 and the Rule of Court, he will be deprived of his constitutional right of a jury trial because the conditions imposed were so "burdensome, oppressive and unreasonable" as to amount to a denial thereof. This Court substituted for the Prohibition petition a rule on the Judges of Lancaster County to show cause why a Writ of Mandamus should not issue directing them to place the case on the jury trial list. The issue is a very important one, viz. whether the Amendatory Act of 1952 or the Rule of Court violate Article I, Section 6, of the Constitution of Pennsylvania, which provides "Trial

by jury shall be as heretofore and the right thereof remain inviolate."

The advantages and the desirability of the Amendatory Act of 1952 and the beneficial results accruing therefrom and which will in all likelihood continue to result therefrom are obvious to Courts and must likewise be obvious to most trial lawyers. Nevertheless, the worthy objectives of or the beneficial results which will flow from an Act are not sufficient to justify a Court in sustaining it if it violates the Constitution.

Authorities are not in agreement on the origin of the right of trial by jury but they are agreed that it is a basic and very important right. In 31 Am. Jur., Page 552, "II Right to Jury Trial" §3, it is said: "The right to jury trial is immemorial. It was brought from England to this country by the colonists, and it has become a part of the birthright of every free man. It is a right which is justly dear to the American people, and one which is expressly guaranteed by the Federal Constitution and by the Constitutions of the several states. In Magna Charta, the basic principle of the right to jury trial is more than once insisted on as the great bulwark of English liberties, especially by the provision that 'no freeman shall be hurt, in either his person or property . . . unless by lawful judgment of his peers or equals, or by the law of the land' a privilege which, according to Blackstone, is 'couched in almost the same words with that of the Emperor Conrad, two hundred years before'."

This ancient right of trial by jury was introduced into this country by the English colonists and is regarded as

one of the most important basic and fundamental features of American Jurisprudence—a right which must be carefully guarded against infringement; 50 C.J.S. II, Section 9 Page 722.

Our Constitution and our decisions do not give an absolute right of trial by jury in all cases, they merely ordain and guarantee that *trial by jury as it existed* at the time of the adoption of the Constitution in 1874 shall remain inviolate. *Watson Appeal,* 377 Pa. 495, 499, 105 A. 2d 576; *Haines v. Levin,* 51 Pa. 412; *Premier Cereal & Beverage Co. v. Pennsylvania Alcohol Permit Board,* 292 Pa. 127, 140 A. 858. The right of trial by jury in trespass actions existed prior to the Constitution of 1874 and, therefore, must be protected and preserved.

Statutes which provide for a voluntary arbitration are Constitutional. Statutes which compel parties to submit to arbitration against their will or without their assent, in other words which impose compulsory arbitration, violate the Constitution *unless there is thereafter an untrammelled right to a trial by jury;* cf. *Cutler & Hinds v. Richley,* 151 Pa. 195, 25 A. 96; *Emerick v. Harris,* 1 Binney 416; *Capital Traction Company v. Hof,* 174 U. S. 1; 50 C.J.S., Section 118, Pages 832, 833.

The law is aptly stated in *Emerick v. Harris,* 1 Binney, supra, (Page 423): ". . . the legislature cannot constitutionally impose any provisions *substantially restrictive** of the right of trial by jury . . . the sacred, inherent right of every citizen, a trial by jury, must be preserved. 'It shall remain inviolate, as heretofore.' " In *The North Pennsylvania Coal Company v. Snowden,* 42 Pa. 488, 491-3,

* Italics throughout, ours.

we said: ". . . if there is any right to which, more than all others, the people of Pennsylvania have clung with unrelaxing grasp, it is that of trial by jury. They brought it with them from the land of their fathers. In every constitution which has been adopted, they have taken care to secure it against infringement, and put it beyond the power of either the executive, the legislature, or the courts to take it away from any individual. . . . The judiciary, no more than the legislature, can deny to any litigant the right of trial by jury, in a case appropriate to such a mode of trial." See to the same effect *Mansfield's Case,* 22 Pa. Superior Ct. 224, 235.

In *Capital Traction Company v. Hof,* 174 U. S. supra, the Court said (Pages 27-28): ". . . by a violation of the trial by jury, I understand taking it away, prohibiting it, or subjecting it to unreasonable and burdensome regulations, which, if they do not amount to a literal prohibition, are, at least, virtually of that character . . . It is sufficient, and within the reasonable intendment of that instrument, if the trial by jury be not impaired, although it may be subjected to new modes, . . . A law containing arbitrary and unreasonable provisions, made with the intention of annihilating or impairing the trial by jury, would be subject to the same considerations, as if the object had been openly and directly pursued."

The Constitution is violated and the right to a jury trial—if the right existed prior thereto—is denied if the Statute or the Rule of Court (1) deprives a party of the right of jury trial or (2) so trammels or fetters it by burdensome restrictions or onerous conditions that this basic American right is substantially or unreasonably encumbered or restricted. Applying that test to the present case,

the majority opinion convincingly points out that the real cause of complaint is (a) that the Act requires the fees of the arbitrators must be paid to the County (by the party appealing from the decision of the arbitrators) before the appellant is entitled to a jury trial and (b) that the Rule of Court fixes a minimum fee for the arbitrators of $75.00. Small, reasonable, unburdensome fees and costs are valid and may be imposed by statute or rules of Court. The statute does not by its terms impose conditions or restrictions which are so burdensome or onerous as to prevent a party demanding a jury trial from securing such a trial upon payment of reasonable fees and costs. These could only be such as are imposed upon any litigant who desires a jury trial without arbitration. If that be the proper construction of the Act of 1836 and the Amendatory Act of 1952, as I believe it is, I would hold said Acts to be Constitutional.

I disagree with the majority's conclusion with regard to Rule of Court No. 43 of Lancaster County. Rule 43 requires, inter alia, that in controversies involving not $1,000.00 or less, but $500.00 or less, a minimum fee of $75.00 shall be paid to the arbitrators. For this reason the Rule is invalid since it does not comply with the enabling Act. Moreover the effect of this Rule is that in a claim for $100.00 or $150.00 or $249.00 a litigant in order to get a jury trial would have to pay the customary jury fee plus an onerous fee to three arbitrators of at least $75.00, whereas heretofore in such cases as well as in cases where his claim was for $10,000 or for $1,000,000 or for $10,000,000, he had to pay a jury fee of only a few dollars. Such a Rule is so obviously unfair to the poor man and so discriminatory and unjust that it cannot be sustained; it imposes

such burdensome and onerous conditions and restrictions on the Right to Trial by Jury that it plainly and unquestionably violates the Constitution!

The majority opinion is what is often called an advisory opinion—a practice which I have urged should be frequently adopted in important cases. See *Clark v. Meade*, 377 Pa. 150, 167, 104 A. 2d 465. The majority have suggested two changes for Rule 43 which are advisable and essential. It is impossible and unnecessary for me to now decide whether an amended Rule embodying those two suggestions would be constitutional; nor is it necessary to now decide whether the present Rule 43 is invalid and unconstitutional for the additional reason that it went into effect after petitioner's case had been listed for jury trial, i.e., after his right thereto had been vested.

In recent years it has become a popular practice throughout our Country to sustain the constitutionality of almost any act that has a desirable objective. That should not suffice to make constitutional what would otherwise be unconstitutional. We must realize the wisdom and necessity of maintaining inviolate precious documents which ordain and guarantee freedom of speech, freedom of religion, freedom of the press, rights of private property and other important basic rights, which have been revered by the people of the United States.

The petitioner sought a right of trial by jury which was undoubtedly his constitutional right. He cannot be deprived thereof by a Rule of Court which violates both the enabling Act and the Constitution.

The Rule to Show Cause should be made absolute!

Mr. Justice MUSMANNO joins in this opinion.

APPENDIX C

No. 590

AN ACT

To amend the act, approved the sixteenth day of June, one thousand eight hundred thirty-six (Pamphlet Laws 715), entitled "An act relating to Reference and Arbitration," by providing by rule of court for the arbitration of certain suits at issue and prescribing the procedure, the appointment and compensation of arbitration, and the payment of fees and costs in such cases.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The act, approved the sixteenth day of June, one thousand eight hundred thirty-six (Pamphlet Laws 715), entitled "An act relating to Reference and Arbitration," is hereby amended by adding, after section 8 thereof, a new section to read as follows:

Section 8.1 The several courts of common pleas may, by rules of court, provide that all cases which are at issue where the amount in controversy shall be one thousand dollars ($1000) or less, except those involving title to real estate, shall first be submitted to and heard by a board of three (3) members of the bar of the county for consideration and award. Cases which are not at issue and whether or not suit has been filed may be referred to the board of arbitration by agreement of reference

signed by counsel for both sides in the case. Said agreement of reference shall define the issues involved for determination by the board and, when agreeable, shall also contain stipulations with respect to facts submitted or agreed or defenses waived. In such cases, the agreement of reference shall take the place of the pleadings in the case and be filed of record.

Section 2. Section 9 of said act is hereby amended to read as follows:

Section 9. [Provided, That it] *It* shall not be lawful for the plaintiff in any suit, to enter [such] *the* rule *provided for in section eight hereof,* until after a [declaration or statement of the cause of action] *complaint* shall have been filed [by him].

Section 3. Section 13 of said act is hereby amended by adding, at the end thereof, two new clauses to read as follows:

Section 13. On the day fixed for the appointment of arbitrators, if both parties attend, either in person, or by their agents or attorneys, the arbitrators shall be chosen in the following manner, viz:

• • • • •

VII. In all cases under section 8.1 hereof, a board of arbitrators consisting of three members of the bar of the court in which such case is pending shall be appointed by the prothonotary from the list of attorneys qualified to act. The names of attorneys from said list shall be taken in alphabetical order, except where attorneys are excused on account of incapacity or illness. Not more than one member of a firm or association of attorneys shall be appoint-

ed to the same board. The first member named shall be chairman of the board.

VIII. The board of three members of the bar shall be appointed ten (10) days after the case is at issue or after filing of the agreement of reference, upon praecipe filed by counsel for either party with notice to the opposing counsel. Where no appearance has been entered in trespass actions, the board shall be appointed on praecipe of plaintiff's counsel to hear the case and pass upon the question of damages. The board shall make its report and render its award within twenty (20) days after hearing.

Section 4. Section 27 of said act is hereby amended by adding, at the end thereof, a new clause to read as follows:

Section 27. Either party may appeal from an award of arbitrators, to the court in which the cause was pending at the time the rule *or agreement* of reference was entered, under the following rules, regulations and restrictions, viz:

• • • • •

V. In all cases under section 8.1 hereof, any party appealing shall first repay to the county the fees of the members of the board of arbitrators herein provided for. Such fees shall not be taxed as costs or be recoverable in any proceeding. All appeals shall be de novo.

Section 5. Section 32 of said act is hereby amended to read as follows:

Section 32. The costs to be paid by the appellant, as [herein-before] *herein* required, may nevertheless, be taxed in the appellant's bill, and recovered of the adverse party, if, in the event of the suit, the appellant is entitled to re-

cover costs, agreeably to the provisions of this act: *Provided, That the compensation of the arbitrators repaid to the county by appellant as provided by clause V of section 27 of this act shall not be taxed as costs or recovered from the adverse party.*

Section 6. Section 40 of said act is hereby amended by adding, immediately after clause V thereof, a new clause to read as follows:

Section 40. Referees and arbitrators in every case, as aforesaid, or a majority of them, shall have power—

* * * * *

VI. The arbitrators shall not be required to make a record of the proceedings before them. If any party shall desire a record, the arbitrators shall provide a reporter and cause a record to be made and the party requesting the same shall pay the cost thereof.

Section 7. Section 49 of said act is hereby amended to read as follows:

Section 49. Every referee and arbitrator, shall be entitled to receive the sum of one dollar for every day necessarily employed by him in the hearing and determination of the cause submitted to him.

In all cases under section 8.1 of this act, the compensation of each member of the board of arbitrators shall be determined by the court and paid by the county for each case heard upon the filing of the report and award, if any. Such fees shall not be taxed as costs nor follow the award as other costs.

APPROVED—The 14th day of January, A. D. 1952.

JOHN S. FINE

APPENDIX D

RULE 43
OF THE COURT OF COMMON PLEAS
OF LANCASTER COUNTY
GOVERNING
COMPULSORY ARBITRATION

Effective July 1, 1954

In the Court of Common Pleas of Lancaster County
Trust Book No. 38. Page 200

In Re: Adoption of New Rule 43 of the Rules of the Court of Common Pleas of Lancaster County Relating to Compulsory Arbitration

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NOW, June 18, 1954, the Court adopts the following Rule 43 of the Rules of the Court of Common Pleas of Lancaster County relating to Compulsory Arbitration:

Rule 43. COMPULSORY ARBITRATION

Section 1. Compulsory arbitration of matters set forth in the Act of January 14, 1952, P. L. 2087 (5 PS 30) is hereby adopted effective the first day of July, 1954.

Section 2. All cases which are at issue where the amount in controversy shall be Five Hundred Dollars or less shall be submitted to and be heard and decided by a

Board of Arbitration which shall be composed of three (3) attorneys who are members of the Bar of Lancaster County, except those involving title to real estate, equity actions, actions upon bail bonds and recognizances, actions upon penal statutes, divorce, mandamus, quo warranto and other actions which do not involve the recovery of money damages.

(a) Appeals from civil judgments before Aldermen or Justices of the Peace except eviction proceedings will be heard by arbitrators under this rule.

(b) The amount in controversy shall be determined from the pleadings or by an agreement of reference filed by the attorneys.

Section 3. Cases which are not at issue, and whether or not suit has been filed, may be submitted to a Board of Arbitration by agreement of reference signed by all parties or their counsel. The agreement of reference shall define the issues to be submitted to the Board, and, when agreeable to the parties, shall also contain stipulations with respect to the facts agreed to or defenses waived. When a case is submitted to the Board by agreement of reference, it shall take the place of pleadings and shall be filed of record in the office of the Prothonotary and shall be assigned a number and term.

Section 4. (a) In all cases subject to this rule, the members of the Board of Arbitration shall be appointed by the Prothonotary from the list of members of the Bar of Lancaster County qualified to act. The attorneys qualified to act shall include only those who file with the Prothonotary their consents so to act. Attorneys subsequently desiring to be eliminated from the list may so notify the

Prothonotary. The Prothonotary shall keep such list in a separate book or file.

(b) Appointment shall be in alphabetical order in all cases, except where a member is excused on account of illness, incapacity or disqualification.

(c) The first named shall be chairman of the Board. Not more than one member of a law partnership or an association of attorneys shall be appointed to the same Board, nor shall an attorney be appointed to a Board who shall be related by blood or marriage to any party to the case or to any attorney of record in the case, or who shall be a law partner or an associate of any attorney of record in the case. Any attorney who shall be disqualified for appointment to a Board for any of the foregoing reasons shall be appointed to the next Board for which he shall not be disqualified.

Section 5. The Board of Arbitrators shall be appointed by the Prothonotary not less than ten (10) days after the case is at issue or an agreement of reference is filed, (unless otherwise stipulated) upon praecipe filed by counsel for either party. A copy of the order of appointment shall be served on or mailed to the adverse party or his counsel. An adverse party may raise questions of the matter being arbitratable under this Rule or the composition of the Board preliminarily by informally notifying the Prothonotary in writing with notice to opposing counsel. The Court shall decide such questions before the matter is heard by the Board on the merits. Failure to raise such questions within ten (10) days of the receipt of notice of the order of appointment constitutes a waiver thereof. Where no appearance has been entered by a defendant in trespass actions, a Board shall be appointed on praecipe

of plaintiff's counsel and shall hear the case for the purpose of determining the amount of damages to which the plaintiff is entitled.

Section 6. Each member of a Board of Arbitration who has signed the report or files a minority report shall receive as compensation for his services in each case a fee of $25.00. In cases requiring hearings of unusual duration or involving questions of unusual complexity, the Court, on petition of the members of the Board and for cause shown, may allow additional compensation. The members of a Board shall not be entitled to receive their fees until after filing a report with the Prothonotary. When the same is filed, the Prothonotary shall issue an order for payment of such fees which shall be immediately paid from county funds as in the case of all other county debts. Fees paid to Arbitrators shall not be taxed as costs nor follow the award as other costs.

Section 7. The Chairman of the Board of Arbitrators shall fix the time and place for hearing and shall give ten (10) days notice thereof in writing, which may be mailed to the parties or their counsel. Hearings shall be held not less than fifteen (15) days nor more than thirty (30) days after appointment of the Board, unless extended by stipulation of all parties or their counsel. All hearings shall be held at the Lancaster County Court House unless otherwise agreed by the parties or their counsel. Before entering upon their duties the members of the Board of Arbitrators shall subscribe to an oath to perform their duties and decide the case submitted to them justly and equitably, and with due diligence, which oath shall be filed with their report.

Section 8. The Board of Arbitrators, or a majority of the members thereof, shall conduct the hearing before them with due regard to the law and according to the established rules of evidence and shall have the general powers of a court including, but not limited to, the following powers:

(a) To issue subpoenas to witnesses to appear before the Board and to issue an attachment according to the practice of the courts for failure to comply therewith.

(b) To compel the production of all books, papers and documents which they shall deem material to the case.

(c) To administer oaths or affirmations to witnesses, to determine the admissibility of evidence, to permit testimony to be offered by depositions and to decide the law and the facts of the case submitted to them.

(d) To adjourn their meetings from time to time and to grant continuances as they shall deem proper.

(e) Cases shall be governed by laws governing arbitration proceedings; rules of procedure shall be those applying to the trial of any case before the Court without a jury.

Section 9. The Board of Arbitrators shall not be required to make a record of the proceedings before them. If any party shall desire a record, the Board shall provide a reporter and cause a record to be made and the party requesting same shall pay the cost thereof.

Section 10. If, after the appointment of a Board of Arbitrators, but before hearing, one of the members thereof shall die or become incapable of acting, or shall refuse to attend the hearing, or shall remove or depart from the

country, the remaining members of the Board shall notify the Prothonotary of the fact and he shall forthwith vacate the appointment and make a new appointment in the prescribed manner to fill the vacancy.

Section 11. If a member of the Board dies or becomes incapable of acting, or shall fail or refuse to perform his duties, after hearing but before a report shall be made, the case shall be decided and the report signed by the remaining members of the Board. If they cannot agree they shall so notify the Prothonotary who shall then appoint a third member from the qualified list of Attorneys to rehear and decide the case jointly with them.

Section 12. The Board shall have the right to proceed ex parte in a proper case, if after due notice, one of the parties fails to appear at the hearing and does not request a continuance for good cause.

Section 13. The Board of Arbitrators shall file a report with the Prothonotary, which shall contain an award in appropriate cases, within twenty (20) days after hearing. The report shall be signed by all or a majority of the members of the Board. The Prothonotary shall file the report and award, if any, and enter the same in the proper dockets and transmit a copy thereof by mail to the parties or their counsel. The report and award, if any, shall be substantially in the form of a verdict of a jury and need not contain a recital of facts nor a statement of reasons for the action taken by the Board but may contain such recital and/or statement of reasons if the Board shall deem it advisable in the discretion of the members thereof.

Section 14. The report and award, if any, unless appealed from as herein provided, shall be final and shall have all the attributes and legal effect of a verdict. If no appeal is taken within the time allotted therefor, the successful party or his counsel may enter judgment on the award upon praecipe after which execution process may be issued upon such judgment as in the case of other judgments.

Section 15. Any party may appeal from the action of the Board of Arbitrators to the Court of Common Pleas of Lancaster County. The right of appeal shall be subject to the following conditions, all of which shall be complied with within twenty (20) days after the report of the Board is filed with the Prothonotary:

(a) The appellant shall file with the Prothonotary a notice of appeal (a copy of which shall be mailed to the adverse party and his counsel by the Prothonotary); an affidavit that the appeal is not taken for delay but because he believes injustice has been done; an appeal bond with sufficient surety in double the amount of costs likely to accrue; and a praecipe ordering the case for trial on the next succeeding civil trial list.

(b) The appellant shall pay all record costs accrued to the time of taking the appeal.

(c) The appellant shall first repay to the Prothonotary for the use of the county all fees received by the members of the Board of Arbitrators in the case in which the appeal is taken. The sum so paid shall not be taxed as costs in the case and shall not be recoverable by the appellant in any proceeding.

Section 16. All appeals shall be de novo. Costs which a successful appellant may recover from the adverse party shall not include the arbitrators' fees paid by him as a condition of taking his appeal.

Section 17. Any case not arbitratable under this Rule may be submitted to arbitration hereunder by stipulation of all parties thereto or their counsel.

Section 18. This rule shall apply to cases involving more than one claim, including counterclaims, if none of such claims exceeds Five Hundred Dollars.

Section 19. This rule shall govern cases pending in the Court of Common Pleas of Lancaster County on the effective date hereof and all such cases to which the rule shall be applicable which are listed for trial shall be stricken from the trial list and referred to arbitration under the provisions hereof.

Section 20. The Prothonotary shall provide such printed forms as shall be appropriate to effectuate the provisions of this rule.

Section 21. All rules of this court or portions thereof which are inconsistent herewith are hereby repealed.

By the Court:
Oliver S. Schaeffer
President Judge
Joseph B. Wissler
Judge

Attest:
Charles D. Mease
Prothonotary

APPENDIX E

THE JUDGMENT APPEALED FROM

"Our conclusion is that the Act of January 14, 1952, P.L. 2087, is constitutional and in all respects valid, but that Rule 43 of the Court of Common Pleas of Lancaster County should be amended in the two respects herein indicated. Petitioner, however, is not presently affected by either of such directed amendments. His claim is subject to the arbitration provisions of the Act, and accordingly the rule to show cause why a writ of mandamus should not issue directing the court to place the case on the list for trial before a jury, is discharged. Costs to be paid by petitioner."

FILED
SEP 7 1955
HAROLD B. WILLEY, C

Supreme Court of the United States

October Term, 1955

No. 314

SARA BILLINGS BOARDMAN SMITH, Executrix of the last Will and Testament of HARVEY A. SMITH, Deceased

Appellant

vs.

JOSEPH B. WISSLER, President Judge, and H. CLAY BURKHOLDER, Additional Law Judge, of the COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA,

Appellees

Appeal from the Supreme Court of Pennsylvania.

MOTION TO DISMISS APPEAL

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1955

NO. 314

Sara Billings Boardman Smith, Executrix of the last Will and Testament of Harvey A. Smith, Deceased,
Appellant

vs.

Joseph B. Wissler, President Judge, and H. Clay Burkholder, Additional Law Judge, of the Court of Common Pleas of Lancaster County, Pennsylvania,
Appellees

I.
MOTION TO DISMISS APPEAL

Joseph B. Wissler, President Judge, and H. Clay Burkholder, Additional Law Judge, of the Court of Common Pleas of Lancaster County, Pennsylvania, by Paul A. Mueller, their counsel, moves the Supreme Court of the United States to dismiss the appeal of Sara Billings Boardman Smith, Executrix of the last Will and Testament of Harvey A. Smith, deceased, from the judgment of the Supreme Court of Pennsylvania in Smith Case, 381 Pa. 223, 112 A. 2d 625 (1955).

II.
NATURE OF THE CASE AND RULING BELOW

By the Act of January 14, 1951 (1952), P. L. 2087, 5 P. S. 30, Supp. et seq., the Legislature of the Commonwealth of Pennsylvania amended the Act of June 16, 1836, P. L. 715, 5 P. S. 21 et seq., so as to empower any Court of Common Pleas by rule to provide that civil cases involving a claim of One Thousand ($1,000.00) Dollars or less must first be submitted to a board of three arbitrators for decision, reserving the right of any dissatisfied litigant to appeal for a jury trial upon his prior payment of the fees of the arbitrators. Pursuant to the power of this Act of Assembly the Court of Common Pleas of Lancaster County adopted Rules of Court applying the Act of Assembly to suits involving a claim of Five Hundred ($500.00) Dollars or less and fixing the arbitrators fees at Twenty-Five ($25.00) Dollars each or a total of Seventy-Five ($75.00) Dollars.

Harvey A. Smith, having brought a suit on a claim for Two Hundred Forty-nine and 19/100 ($249.19) Dollars filed a petition for a writ of prohibition in the Supreme Court of Pennsylvania in order to test the constitutionality of the 1951 Act, without ever having submitted his cause to a board of arbitrators for prior determination as therein provided. On rule granted, and after argument and briefs filed, the Supreme Court of Pennsylvania rendered

a judgment sustaining the constitutionality of the 1951 Act and of the Rules of the Court of Common Pleas of Lancaster County issued pursuant thereto. In its majority opinion the Supreme Court of Pennsylvania suggested certain changes to the Rules of Court which have since been made. The minority opinion of the Supreme Court of Pennsylvania upheld the constitutionality of the Act of Assembly, but stated that the original rules of court violated both the statute and the constitution.

From this judgment, Harvey A. Smith having since died, the present appellant, as his executrix, seeks review in this appeal by the Supreme Court of the United States.

III.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

(A) There is no substantial federal question presented in this appeal.

Appellant contends that she is being deprived of her constitutional rights of due process and of a jury trial.

Insofar as due process is concerned, it is submitted that appellant has all her rights preserved and guaranteed by this Act. Appellant has a right of hearing, right to a jury trial, right of appeal, oral argument, and a right to meet all issues at all times in her litigation. As a matter of fact appellant has not even had her claim passed upon by a board of arbitrators.

Insofar as her constitutional right to a jury trial is concerned, the 7th Amendment only applies to trials in federal courts. See, *Walker vs. Sauvinet,* 92 U.S. 90, 23 L. Ed. 678 (1876); *Pearson vs. Yewdall,* 95 U.S. 294, 24 L. Ed. 436 (1877).

There is, therefore, no substantial federal question involved.

Consolidated Turnpike Company vs. Norfolk & Ocean View Railroad Company, 228 U.S. 596, 33 S. Ct. 605, 57 L. Ed. 982 (1913);

Tyler vs. Judges of Court of Registration, 179 U.S. 405, 21 S. Ct. 206, 45 L. Ed. 252 (1900);

Capital Traction Co. v. Hof, 174 U.S. 1, 19 S. Ct. 580, 43 L. Ed. 873 (1899).

(B) The judgment of the Supreme Court of Pennsylvania rests on an adequate non-federal basis.

By the express terms of the Act of Assembly involved, appellant can get a jury trial and the Supreme Court of Pennsylvania has decided that the Act does not violate the Pennsylvania constitution. Appellant is really complaining that if she loses before the arbitrators, and is successful on appeal after a jury trial, she cannot get back the arbitration fees she had to pay as a condition precedent to the appeal. In Pennsylvania the right to recover costs in litigations is a matter of statute and not one either of common law or constitutional right. See, *Morganroth's Election Contest Case,* 346 Pa. 327, 29 A. 2d 502 (1943); *Grim v. Weissenberg School District,* 57 Pa. 433 (1868); *Tunison vs. Commonwealth,* 347 Pa. 76, 31 A. 2d 521 (1943).

Where the judgment of the Supreme Court of a state is clearly supported on non-federal grounds this court will not take jurisdiction.

Eustis vs. Bolles et al., 150 U.S. 361, 14 S. Ct. 131, 37 L. Ed. 1111 (1893);

Enterprise Irrigation District et al. vs. Farmers Mutual Canal Co. et al., 243 U.S. 157, 37 S. Ct. 318, 61 L. Ed. 644 (1916);

Howat vs. State of Kansas, 258 U.S. 181, 42 S. Ct. 277, 66 L. Ed. 550 (1921);

Lynch vs. New York, 293 U.S. 52, 55 S. Ct. 16, 79 L. Ed. 191 (1934).

CONCLUSION

The appeal of Sara Billings Boardman Smith, Executrix of the last Will and Testament of Harvey A. Smith, deceased, should be dismissed because (1) there is no substantial federal question presented in this appeal, and (2) the judgment of the Supreme Court of Pennsylvania rests on an adequate non-federal basis.

Respectfully submitted,

PAUL A. MUELLER,
Counsel.

FILED
SEP 23 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

No. 314 October Term, 1955

SARA BILLINGS BOARDMAN SMITH, Executrix of the last Will and Testament of HARVEY A. SMITH, Deceased

Appellant

vs.

JOSEPH B. WISSLER, President Judge, and H. CLAY BURKHOLDER, Additional Law Judge, of the COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA,

Appellees

Appeal from the Supreme Court of Pennsylvania.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL

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STATUTE:

Constitution of Pennsylvania, Art. I, Sec. 11 4

ARGUMENT FOR APPELLANT

A. WHETHER THE FEDERAL QUESTION IS SUBSTANTIAL

As we understand appellees' argument, it is that because a right of appeal from the Boards of Arbitration is provided by the Pennsylvania Statute and the Rule of Court, appellant is not deprived of due process. By implication they concede that *without a right of appeal* from the arbitrators appellant *would be* deprived of due process, and this the Supreme Court of Pennsylvania conceded.[1] But the real question is, Is the right of appeal provided unsubstantial and illusory? Does the Statute deprive a large class of litigants, including appellant, of the right to litigate their claims before a *judicial* tribunal?

We have never contended that the Federal Constitution guaranteed trial by jury in State courts. We do contend that compulsory arbitration of civil rights of action before an irregularly constituted tribunal, without the safeguards of a court of law and of record, is a violation, not of the Seventh Amendment, but of the Due Process Clause of the Fourteenth Amendment.

Aside from the fact that deprivation by a State of the civil rights of a single individual guaranteed by

[1] Opinion of Supreme Court of Pennsylvania. Jurisdictional Statement, p. 21.

the Federal Constitution presents a substantial federal question, the preeminent importance of this case and of the federal questions raised by it, lies in the fact, as stated in our Jurisdictional Statement, that this Statute is but the entering wedge for removing a class of litigants that will grow ever larger from those entitled to have their causes tried judicially, i.e., according to the course of the common law, which means due process.

As to the suggestion that appellant was not deprived of due process because she did not first have her case passed on by arbitrators, it is sufficient to say that this suggestion is now made for the first time and was not made in the Court below, that that Court assumed she had a right to have the constitutional question decided *in limine* and did in fact pass upon and uphold the constitutionality of the Statute and the Rule. It would have been a mockery to have raised in the Court of first instance the question of the validity of the Rule adopted by that Court, after, we must assume, due deliberation, or to have raised there the question of the validity of the Statute under which the Rule was adopted, without a conviction of the validity of which it would certainly not have been adopted. Surely it was not necessary for appellant to undertake the expense and inconvenience of a trial before arbitrators when the result, whether win or lose, would have been a vain thing. Must a citizen subject himself to a proceeding at which every fibre of his being rebels, in order to attack the validity of that very proceeding, or can he, by resorting to established procedures, invoke the protection of the higher courts

against that form of oppression? In this day and in this country there can be but one answer.

B. DOES THE JUDGMENT BELOW REST ON A NON-FEDERAL BASIS?

We confess we do not understand the argument for the appellees on this point.

The objections that the Statute and the Rule of Court violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment were raised in the Court below at the very outset of the proceeding. That Court agreed that the Statute and Rule would violate the Due Process clause as compulsory arbitration but for the provision for an appeal, and held that the appeal provided rendered the Statute and Rule valid. It is true the judge who wrote the opinion did not discuss the federal question, other than to state that the Statute would be unconstitutional if it provided for compulsory arbitration, *but the federal question could not have been more squarely decided.*[2] The fact that the Court below also held that the Statute and Rule did not violate the State Constitution does not establish a nonfederal basis for its decision. It is

[2] "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect." *Oyama v. State of California*, 332 U. S. 633, at 636; 68 S. Ct. 269 (1948). To the same effect is *Norris v. State of Alabama*, 294 U. S. 587; 55 S. Ct. 579 (1934).

begging the question to argue that a decision that the Statute and Rule were valid under the State Constitution is a decision on a nonfederal ground, when their validity under the Federal Constitution was challenged and the decision was that the Statute and Rule were valid. In this connection it may be noted that the provisions of the State Constitution relating to due process are in effect the equivalent of those of the Fourteenth Amendment.[3]

The question of *costs* referred to by the appellees is likewise beside the point. In the first place, the arbitrators' fees are not costs. *It is expressly so declared by the Statute.*[4] It had been held before that such charges are *administrative expenses* and should be borne by the governments involved.[5] The Court below recognized that in this case.[6] But even if the arbitrators' fees had been costs, the doctrine that the right to recover costs is of purely statutory origin has nothing to do with this case. The question here is whether the deliberate imposition of such fees as prerequisite to

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[3] "Every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay". *Constitution of Pennsylvania*, Art. I, Sec. 11.

[4] Secs. 4 and 5 of the Act of 1952. Jurisdictional Statement, pp. 35, 36.

[5] *Rich Hill Coal Co. v. Bashore*, 334 Pa. 449, at 499; 7 A. 2d 302 (1939).

[6] Opinion below. See Jurisdictional Statement, p. 23: ". . . if, therefore, the right to recover costs may be withheld by the legislature without infringing the Constitution *it would seem* that the right to recover the compensation paid the arbitrators *which is an administrative expense*, may similarly be withheld". (Italics ours)

the right to appeal is a penalty and a confiscatory one and, if it is, whether it constitutes a deprivation of due process.[7]

If the Court below had held that the case should be decided against appellant because she had not first submitted her case to arbitration, there might be some semblance of basis for an argument that the decision was on a nonfederal ground, although even then there would remain the question whether or not the nonfederal ground was substantial.[8] However, the Supreme Court of Pennsylvania specifically did *not* decide the case on that ground. It deliberately decided it on the merits and passed on the constitutionality of the Act and the Rule of Court. It could not have done otherwise and followed its prior decisions. It had held that it exercised a general supervisory jurisdiction over the Courts of Common Pleas and Quarter Sessions of Pennsylvania, with power to correct and prohibit unlawful and oppressive procedures.[9] It had specifically held that in arbitration cases the question whether a case is arbitrable is to be decided *in limine* and that litigants do not first have to submit to arbi-

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[7] This question was decided in accordance with our contention in *St. Louis I. M. & S. Railway Co. v. Williams*, 49 Ark. 492; 5 S.W. 883 (1887), a case practically on all fours with the case at Bar. Cited in *Gulf, Colo. & Santa Fe Rwy. v. Ellis*, 165 U. S. 150 (1897). See also *Malin v. LaMoure County*, 27 N.D. 140; 145 N.W. 582 (1914).

[8] *DeMorest v. City Bank Farmers Trust Co.*, 321 U. S. 36; 64 Sup. Ct. 384 (1944).

[9] *McNair's Petition*, 324 Pa. 48; 187 A. 498 (1936), where the Supreme Court of Pennsylvania awarded writs of Prohibition and Mandamus to halt an oppressive Grand Jury investigation.

tration and then appeal.[10] As the Court below decided this case, to go back before arbitrators now and take successive appeals would not only be oppressive, but would be going through meaningless motions, as the question is *res adjudicata*. So far as the State Courts are concerned, the *federal* question *has been decided* by the highest Court of the State. Appellant's only recourse is in this Court.[11]

Moreover, Appellant's testator, the original plaintiff, could not, under this Statute and Rule of Court, have gotten his case up for trial at all except by listing it for trial before the arbitrators (Section 5 of the Rule, Jurisdictional Statement, p. 39). Cases under the prescribed amount listed for trial in court were to be struck off the trial list (Section 19 of the Rule, Jurisdictional Statement, p. 44). Appellant's case *was* listed for trial and *was* struck off the list by the Prothonotary, who is merely a ministerial officer of the Court of Common Pleas. To have sought a mandamus against the Prothonotary in that court would have been to ask the court to decide against its own Rule and to have made it a judge in its own cause. Appellant's testator had only two other courses: one, to seek redress from the Supreme Court of Pennsylvania by

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[10] *Goldstein v. International Ladies' Garment Workers Union*, 328 Pa. 385; 196 A. 43 (1938). See also *Pennsylvania Railroad Co. v. Driscoll*, 330 Pa. 97; 196 A. 43 (1938). *Harris v. State Board of Optometrical Examiners*, 287 Pa. 531, 534; 135 A. 237 (1926).

[11] *Laurence v. State Tax Commission of Mississippi*, 286 U. S. 276; 52 S. Ct. 556 (1932), where a somewhat similar situation arose.

invoking well established procedures, which he did, or, two, by listing his case for trial before arbitrators. Had he pursued the latter course, he would, by resorting to the procedures established by the Statute and Rule of Court, have waived his right to object to their unconstitutionality.[12] This the court below recognized and therefore decided the question of the validity of the Statute and Rule.

It is respectfully submitted that the Motion to Dismiss the Appeal should be denied.

ROBERT RUPPIN,
Counsel for Appellant.

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[12] *Hurley v. Commission of Fisheries*, 257 U. S. 223; 42 S. Ct. 83 (1921). *Pierce Oil Corp. v. Phoenix Refining Co.*, 259 U. S. 125; 42 S. Ct. 440 (1922); *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407; 37 S. Ct. 609 (1916); *St. Louis Malleable Casting Co. v. Prendergast Construction Co.*, 260 U. S. 469; 43 S. Ct. 178 (1923).

No. 314. SMITH, EXECUTRIX, *v.* WISSLER, PRESIDENT JUDGE, COURT OF COMMON PLEAS OF LANCASTER COUNTY, ET AL. Appeal from the Supreme Court of Pennsylvania, Eastern District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. *Robert Ruppin* for appellant. *Paul A. Mueller* for appellees. Reported below: 381 Pa. 223, 112 A. 2d 625.